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The Washington Post

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November 10, 1984

Representative Glenn L. English
Chairman
Subcommittee on Government Information & Individual Rights
Committee on Government Operations
B-349-C Rayburn House Office Building
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Over the past three years, I have been directing a project designed to examine in considerable depth the American foreign policy and national security decision-making processes on behalf of the Washington Post and Alfred Knopf, Inc. Along with a staff of five professionals, I have filed several hundred requests under the Freedom of Information Act with over twenty agencies and departments and have observed the variety of agency performances in responding to these requests. Although in prior years my experience with the FOIA was less extensive, I believe a pattern of intentional efforts to undercut the effectiveness of the FOIA is emerging. I have noted for your consideration and inclusion in the hearing record several of these trends and some possible solutions. Under separate cover, I am also forwarding a more detailed outline of our agency-by-agency experience.

A Positive Note

Before I describe what I believe is wrong with the current applications of the FOIA by agencies, I would like to note how immensely valuable the FOIA has proven to be for those interested in government decision-making. Some critics predicted that the FOIA would result in a thinner historical record because agency personnel would not create or retain as detailed a paper trail of decision-making as they might have otherwise. This has proven to be incorrect. The obligations of decision-making in as complicated an organizational setting as the national security community requires that virtually every nuance of information and advice be eventually reduced to writing. Repeatedly records released under the Act have shown how incomplete or misleading public accounts based on oral recollection, background briefings, and leaks have been.

In fact, the Act has made the documented historical record more complete and relevant than ever before. Remarkably, a substantial number of the relevant public policy papers although buried in the bowels of government far from public view are either not classified or include sections which are unclassified or declassifiable. In those cases where most documents are not yet declassified, the releasable portions of the denied records -- for example, the identities of those drafting, clearing or receiving copies of documents -- allow energetic journalists to get multiple, contemporary accounts of recent events instead of waiting for the opening of historical archives by which time the participants have either died, forgotten or selectively edited the documentary materials still available.

The Act has had three generally fortunate, and perhaps unintended, effects on the documentation of events: (1) more detailed and varied accounts of decisions are retained by various actors in the process to protect themselves against the retention of a partial and incomplete record by other parties; (2) record retention requirements are in many instances more scrupulously observed and enforced; (3) those in government who would deny their role whether it be out of embarrassment or a desire to avoid accountability for their actions are now more conspicuous by virtue of the records which they fail to keep, which they deny exist, or which they go to improper lengths to conceal.

In short, the existence of a pervasive effort in agencies to administratively thwart the Act is a testament to the Act's strength and value. Partially frustrated or not, the Act as we have it now is an immensely valuable tool precisely because so many executive branch employees work diligently and conscientiously to apply the act as it was intended.

It is my contention that regular and informed use of the Act by journalists, scholars, historians, and knowledgable public policy commentators will make a singularly valuable contribution to the continual corrections of course that make democracy the finest form of government on earth. The danger is that the FOIA may be largely abandoned because of the efforts of several dozen senior agency officials who have set out to frustrate its intention. At present, the Act is used regularly only by the few who are willing to confront and able to surmount the administrative obstructions we begin to catalogue below. It is in the spirit of making the Act more accessible to regular use by more individual users that we offer these comments.

1. "Lost" Cases and Inexplicable Processing Delays

Our single greatest problem has been the extended and inexplicable delay in FOIA processing within certain agencies -- most notably the State department , the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Council, the Office of Management and Budget, the Treasury department and recently most components of the Department of Defense. The excuses have ranged from "the case was lost" (the State department claims to have lost over thirty cases, some twice, for periods of up to three years) to placing the blame for fumbled processing on departed employees, bureaucratic inefficiency, and epidemic incompetence. In both the State department and the CIA, a claim is made of first-in, first-out queues; yet we have filed cases three years ago with both agencies which have not received answers while cases filed by other requesters within the last few months have received responses.

While the CIA has strictly speaking never "lost" a case, it has taken in excess of two years to process the vast majority of our requests. For all practical purposes, the CIA has not yet completed the processing of a single major request among the five dozen cases filed since 1981 with the exception of (a) "no record" determinations, (b) complete denials, and (c) a few isolated records here and there.

In one recent case, DIA took 404 days (extremely quick by their normal standards) to deal with a request for copies of eight, blank, commonly-used, unclassified forms and one manual, all requested by the precise number and citation that appears in the Listing of Approved Department of Defense (DD) Forms, DoD 5000.21-L, an unclassified, published document in the widest possible circulation. DIA's response was totally unsatisfactory and indicative of the lengths that this particular agency will go to frustrate a lawful request. They enclosed one form (which they knew was contained in the body of a publication we had recently secured from other sources), denied six forms under (b)(2) and purported not to be able to find the other form and manual, despite the fact that

the DoD master list of forms shows the form as being promulgated based on precisely that manual. Calculate for a second the effect of the initial delay in such a case. We must now appeal, a process which will take between one and two years minimum, in order to get them to even begin to locate the one form and to treat the request for the six denied forms seriously. We are then likely to face another year of administrative delay by appealing their next of procedural obstructions.

The National Security Council's operations are inexplicably slow with turn around times of several years on many requests despite an extremely small caseload. Although the NSC FOIA office has refused to meet with us regarding these delays, we suspect they reflect deliberate understaffing to slow requests more than any single other factor.

In each of those agencies with which we have dealt, we have discussed the processing delays at length with the key personnel, many of whom are dedicated and resourceful. Their frustrations have left us with no question that extraordinary processing delays are most often a function of agency understaffing. However the absense of adequate staff is only due partially to budget constraints; it is also due partially to deliberate decisions that FOIA offices should be left to run inefficiently. In fact, the pattern of purposeful delay in processing regular requests has become so pervasive that it leads us to believe, at least in the FOIA office with which we have dealt, that the primary management goals achieved each year are rank inefficiency, sporadic incompetence and consistently inadequate staffing. If after reading the materials enclosed, you have the slightest doubt that this is the case, we will be happy to provide additional details and specific examples.

The judicial history of the FOIA makes it clear that the federal courts are not about to hold agencies to statuatorily mandated time periods without some indication of congressional willingness to fund more rapid turn around times. We favor more adequate budget allocations to those particular FOIA offices saddled with backlogs of requests dealing with national security matters on several grounds. The FOIA staff faced on one hand with frustrated requesters and on the other with agency personnel anxious to protect the sanctity of their information are truly overworked and unable to do their job properly. Second, the absense of adequate information accessible to the public on important foreign affairs and defense matters has extremely grave consequences effecting the quality of public and legislative debate on national security issues.

Third, the ability to channel press requests into indefinite FOIA delays has created an incentive to stop servicing requests through public information offices who have adequate resources to deal with them and shunt them to FOIA offices who do not. The solution, discussed more fully below, is to require that those public affairs resources be adequately allocated to FOIA.

The material eventually declassified and released in a case with such extraordinarly delays has often been overtaken by subsequent events. Because the initial retrieval in some agencies is relatively prompt while the review process may take years, requests for contemporary materials are two years old by the time of initial release. This too effects the quality of public comment and debate.

We believe the most egregious cases could be ameliorated by a legislative provision requiring that, in each instance where an agency fails to complete the processing of a request within eight weeks of its receipt, the agency must send the requester a detailed report which states precisely what has transpired since the receipt of the request. Thereafter at each subsequent eight week interval, the agency would be required to provide the requester with an additional report.

Conversations with the FOIA officials responsible for processing and record retrieval and the senior departmental officials who in certain cases must review

sensitive records have led us to conclude that many delays and "lost" cases result from the bureaucratic incentive to put off decisions until the last minute. We believe that many release determinations would be made more promptly if the time required to make the determination was not significantly greater than the time to meet the requirement to provide progress reports on the case.

We believe that these reports should include documentation which will allow the average requester to determine the problem which has delayed processing and the identity of the particular individual with responsibility to complete processing.

Included would be such items as (a) the date the request was received, (b) the date referred for search or other processing, (c) the office and/or individual to which it was referred and the name and title of each individual with whom responsibility for any portion of the case resides, (d) the date referral was received in each office, (e) the number and location of files searched described by name of collection, by name of the individual file or by the number of files searched in each collection, by number of documents retrieved from each file or collection, by hours spent searching each collection, and by costs incurred for which the agency expects to seek reimbursement, (f) the date of referral for release determination and the name of the person reviewing documents for release at each stage, (g) the number of documents reviewed and the result of review by document number, (h) the number of documents still pending action and the steps remaining prior to completion of the request.

Since the reporting requirement is only activated when the agency fails to make a determination within a period more than five times as long as the ten-day initial response time mandated by the statute, we believe that such a documentation requirement would not be burdensome. In addition, we note that some FOIA offices already collect similar information informally in order to assist them in managing the processing of cases.

We recommend that such reports also be required at eight week intervals by the agencies in administrative appeals. In addition, if the appeals are not then resolved in twelve weeks, we believe some provision should be made to include in the next progress report an index similar to a Vaughn index of all documents retrieved to assist the requester in evaluating the necessity of immediate litigation.

To deal with the problem of materials being several years out of date by the time a request is finally processed and released, we believe that Congress should require in the statute that in cases where the request calls for documents to "the present" and in which the time between the search and the final review exceeds twelve weeks, the agency shall be required to automatically update the search. While that search is taking place, the previously retrieved materials should be reviewed and released.

2. Delay through Special Queues

Certain agencies including the Department of State and the CIA have created queue systems which are designed to delay longest the processing of precisely those requests which are of the greatest and most immediate public interest. These queues are not the type of multiple first-in-first-out queues which the FBI maintained were adequate for the purposes of the statute in the Open America case, but queues which result in the systematic delay of selected cases. State department policy dictates that the regional bureau or office must clear materials before they can be released. Those requests for information about crises and breaking news events are funnelled to those few senior officials in charge of dealing with these crises, while those requests for information about less immediate and pressing matters are directed to those officials who are more likely

to have time to process the cases. This means that regardless of the mean processing time for the agency, the longest processing times are, de facto, for precisely those materials dealing with the greatest public concerns, such as Central America, Lebanon, Iran, and the Arabian Pennisula. This multiple queue process routinely delays the records relating to the most important events for many months, if not years, after the events have lost their immediate currency. And as a result, journalists have grown to expect that the FOIA will not help them. For example, in the State department the processing delay for matters relating to the Persian Gulf or Central America are in most instances in excess of eighteen months, some as long as three years. Meanwhile other requests on more trivial matters may take as little as three months and rarely as long as one year.

Recently Department of Defense and DIA have instituted another version of the "special queue" form of deliberate delay. In cases where they have taken over a year to process requests and then denied portions of documents, it often takes us considerable time to retrieve the information necessary to frame a proper appeal, particularly when they are unwilling to provide any clue as to what documents have been denied. In prior years in instances where the appeal is not filed within 45 working days as required by Department of Defense regulation, Department of Defense and DIA had a policy of processing the appeal anyway. The logic cited was that if it was not treated as an appeal, it would have to be processed as a new request anyway. However, DIA and DOD have recently instituted a policy of refusing to process appeals which have not been filed by the 45th day. They have even applied this in cases where their own processing has taken several years and, just this past week, DIA even tried to use it to avoid processing an appeal which it took them 108 days to decide was untimely.

Consider for a moment how effectively DIA's strategy of delay frustrates the intent of the FOIA. In our experience, the DIA takes at least two and often three years to complete process a case and an appeal of the initial denial. Add to this, procedural delays such as refusing to process cases until exorbitant, bogus fees are paid (see below) or claims that appeals are untimely, and you soon have nearly doubled the time to between four and six years before an requester has even exhausted his administrative remedies.

Thus the statutory ten days for search and response and twenty day appellate period suddenly blooms to a half decade of processing. Admittedly these systematic delays can be short cut by taking cases to court after a shorter time. However, federal judges are reluctant to take action against an agency who has not completed the processing of a case at either the initial determination or appellate level. And when a judge does act, his discretion is limited to enforcing what the statute called for in the first instance. Moreover, most requesters cannot afford to take every case to federal court to get agencies to do what the statute plainly requires them to do in the first place.

The CIA claims that in order to avoid delays created by the necessity to search files for raw intelligence reports it has created a special processing queue which searches only published intelligence files. The CIA regularly asks requesters to accept only the published intelligence files and to waive the search of these raw intelligence files in order to expedite the processing of the case. However, in the dozen or so cases in which we have accepted this offer, it has never resulted in expedited processing since we have yet to see the results of such a case after as a long as three years. In the few cases processed by the CIA to date, we have been able to determine from the small numbers of records retrieved that the indices of these raw intelligence reports have not be searched.

We believe that future FOIA legislation must require that if there are multiple processing queues within an agency, then those queues should be set up in such a manner that they operate at the same pace. This can be done by having FOIA

personnel perform all mechanical tasks other than the final review of the document. Alternatively, we suggest that separate queues be established for FOIA requesters who have demonstrated through publishing, broadcasting or other methods of dissemination their intention and ability to communicate the information to the general public or professional audiences who in turn will benefit the general public.

Overworked senior agency personnel are faced with the prospect of having to review the same sets of sensitive documents several times in cases where journalists and others are interested in newsworthy developments. In such instances, we believe agencies should be obligated to maintain a detailed index of requested and released material and a library of the released materials.

In an effort to avoid litigation we agreed with the State department to withhold certain suits in return for their willingness to set up a Central America documents collection of all materials released to requesters on Central America. The effort has not only worked but it has demonstrated why it would have saved considerable effort. Over three thousand pages of materials previously sought by this requester have been provided to other requesters within the last four months. We suspect from examining the State department's index of requests on Central America that as many as twenty requesters have sought a group of roughly five thousand pages of the same documents over the past two years. Measured in terms of what a State department library in this one subject area could save, this would alleviate the necessity to retrieve 95,000 pages of materials at total savings of between $20,000 to $50,000 in official time, most of it the time of the same senior officials whose backlog creates the longest queues.

Lastly, in order to deal with the delays caused by limitations on the time period allowed for appeals, the statute should state that the requester shall have a certain minimum number of days within which to appeal or the same length of time that it took to get a complete response to the original request, which ever period is longer.

We also feel that in order to prevent the creation of additional special queues which delay processing, Congress should require each agency to report statistically on the number of cases processed by each seperate queue it maintains, the number of cases <u>processed</u> <u>and</u> <u>pending</u> within certain time periods (for example, 1-30 days, 31-60 days, 61-90 days, 91-180 days, 181-365 days, 366 - 730 days, over 730 days).

In one set of instances -- where agencies cannot show that the average processing time is less than some statutory minimum more reasonable than the present 10 days, say 60 days -- we believe a special queue may be appropriate -- such that requests from journalists and non-profit organizations who are requesting the material for imminent publication are given expedited processing before requests on other subjects by other requesters.

3. <u>Non-record Records</u>

There seems to be trend among certain agencies, particularly the Office of the Chairman of the Joint Chiefs of Staff, the Department of State and DIA to deny that certain documents within their possession are agency records. We are deeply concerned that in the wake of the BNA case [Bureau of National Affairs, Inc v. U.S. Department of Justice (D.C. Cir. August 31, 1984)] this trend will become even worse. Several blatant examples should serve to illustrate our point.

Under the Executive order establishing the Kissinger Commission, the Department of State was the agency responsible for administrative support including servicing FOIA requests. Our request for materials gathered by the Kissinger Commission from State and other agencies received no answer for many months. Finally after considerable delay, State informed us that regardless of the

President's executive order, they were now declaring the documents to be the property of a presidential commission and unavailable under the FOIA until they had been received and catalogued by the National Archives as part of the Reagan library. They provided no explanation for their unwillingness to process those State department documents provided to the Kissinger Commission to which State obviously still has access.

The State department, after having deliberately misrepresented the nature of former Secretary of State Alexander Haig's record keeping system, is now claiming that all documents which indicate with whom he met and on what occasions are personal materials which are not subject to the FOIA. This determination is so far beyond what even the BNA case contemplated as to ultimately amount to a declaration that all records created for a cabinet official's use are his personal records.

The National Security Council regularly applies the exemption for presidential materials to the work product of the National Security Adviser and his deputy even when the material was not intended for the President's personal use. For example, meeting logs and travel records of Dr. Brzezinski and others were treated as presidential papers despite the admitted fact that the President did not use the logs, never saw them and that they had more to do with NSC staff matters than with presidential materials. Similarly, the departments are now instructed that any materials they prepare in response to NSC directives should be prepared on NSC stationary for the NSC's review to see if it can be declared exempt presidential material.

The Office of the Chairman of the Joint Chiefs of Staff have claimed repeatedly that they possess no "agency records" relating to trips by then CJSC David Jones and/or his staff to Saudi Arabia to negotiate the sale of the AWACS and other Command, Control and Communications equipment or access to Saudi facilities. Any documents relating to the trip are deemed to be personal notes and not "records."

The Navy has gone even further down a path purportedly opened by the BNA decision. Secretary Lehman maintains that all records relating to his travel, meetings, appointments, and telephone calls are strictly personal records including even the vouchers representing funds for which he was reimbursed for "official travel." The Navy FOIA office has refused also to release any records relating to any attempts to get Secretary Lehman to reimburse the Navy for the funds paid to him for "official travel" which he now claims were purely "personal" business trips.

The Air Force has taken the same position on behalf of Secretary Orr in refusing to release any records relating to his travel, meetings, and telephone calls on the basis that they are "strictly personal."

In dealing with requests for the meeting logs of Casper Weinberger, the General Counsel of the Department of Defense explicitly stated that Mr. Weinberger had ordered that no meeting logs be kept of his activities. Yet the Department has now claimed that such records, in fact maintained by full time staff with no other duties, and filled out after appointments rather than before them (as distinquished from personal appointment calendars which the BNA case said might be kept for the sole personal convenience of the official) and retained by the Department, are Weinberger's personal property. At the same time, the Department has refused to make available any records showing Weinberger's reimbursement for the hundreds of thousands of dollars of agency money spent maintaining these "personal records" kept "solely for his personal convenience."

In another set of cases, the Department of Defense has begun refusing to search for any records in its possession which were originated by another agency even though these records are admittedly in their possession. Instead they

recommend that the request be filed with the originating agency. Since they view this determination as a no records determination, they allow no appeal. Since such records are often sought from them precisely because the original agency has destroyed them or, in the case of the CIA, refuses to process requests until several years have passed, this determination often has the effect of making such records permanently unavailable.

In a like manner, the CIA has now systematically begun refusing to even search for certain intelligence reports when specified by date and report number on the basis that they can neither "confirm or deny" the existence of such reports, despite the fact that even under the recently passed bill on public disclosure of operational files of the CIA, they are required to do so and have in fact released such reports in the past.

In the CIA and certain components of the Department of Defense, the regularity with which "no record" determinations are made leads to the inescapable conclusion that searches there are deliberately and systematically inadequate. Responses that indicate that only one record has been retrieved in categories that by definition must include multiple records lead us to believe that systematic searches are not conducted by the CIA and certain Department of Defense components.

We believe that Congress must define precisely the term "agency records" and must create a legislative history sufficiently adequate to coincide with the actual use made of the material in the agency. We believe that records which reflect the official business day, office routines, and which provide the only documentation of how, where, when and with whom business was conducted by an official are obviously (as the GSA Records Retention Schedule provides) agency records. The Congress should correct the effect of the BNA ruling and prevent the grave damage of increasingly broad misinterpretations by the agencies themselves.

We also believe that the interim report format we have suggested above would do much to let requesters know if the "no record" determination was a function of inadequate search or a genuine failure to find the material after a search of the relevant files.

With regard to the failure of agencies to process records in their possession on the basis that they were originated elsewhere, we believe that the law is clear that this failure to process is improper and that this may be appropriate for detailed oversight.

4. Deliberate, Improper and Illegal Document Destruction and Withholding of Records: The Need for Sanctions

In several agencies, we have been able to document deliberate attempts by particular officials to delay the processing of FOIA requests. In the Department of Defense one official has apparently ordered the destruction of records sought under the FOIA. One Department of Defense lawyer has urged employees to remove records from the Department in order to prevent processing them under the FOIA.

In the Department of State, in an otherwise conscientious FOIA office, a few FOIA officials have deliberately delayed the processing of requests, have transferred records to other departments and, in at least the case of one official, have lied about the existence of records.

In the Defense Intelligence Agency, officials have deliberately misused fee charges, appeal criteria, false statements about the length and classification of documents to delay or even totally avoid processing requests.

In the Department of Defense recently, there has been an epidemic of recent attempts to discourage use of the FOIA, in which a well defined group of officials in such components as the OJCS, ODUSD(P), OASD(ISA), DSAA, and elsewhere making repeated false statements about the costs of processing materials, about the

number and length of responsive documents, about the level of classification of the documents, and, we suspect, about the applicable FOIA exemptions.

Our experience had been that the vast majority of agency personnel who handle FOIA requests on a daily basis are conscientious, hardworking and honest. There has been, however, a small, but not insignificant portion who deliberately obstruct the process either as a matter of agency policy or personal predilection. At present there are no effective sanctions for agency employees who deliberately thwart the purposes of the act. When the act is deliberately thwarted, the requester and even the courts must often go to extraordinary lengths to even compel the agency to do what the law requires it to do in the first place. Even then, except in the rare instance that the capricious and arbitrary denial of records occurs in the face of an order of the court to produce materials, judges are unable to apply any sanctions to deter future behavior. Since the same individuals are often repeat offenders, we believe this area calls for legislative action.

We believe there is a need for further administrative procedures and civil penalties to deal with deliberate failures to process documents in a timely manner and for capriciou ?
certain instances where there has been documented destruction or where an agency official has knowingly caused factual misrepresentations to have been made, the appropriate set of existing federal criminal sanctions should be made explicitly applicable. In one instance in which we were informed of document destruction by the Department of Defense, the Justice department refused to move against the specific individuals on the basis that the destruction, even if it could be proven, was not criminal.

I believe that such sanctions would significantly deter the few individuals who commit the vast majority of the most egregious examples outlined here. Such a provision must allow a requester to request certain required processing documentation at the appellate stage to allow him/her to determine whether a judicial remedy should be sought. Similarly, it must allow the same information to be sought by the requester for possible presentation to a United States Attorney in the case of a criminal action.

We believe that the records required to document any such sanctions would be the same as the interim reports suggested in item 1 above. Apart from the implementation of sanctions against officials, the next most important change that could be made in our view would be to require agencies to have a single centralized FOIA processing office with initial responsibility for release determinations. This is particularly important in regard to Department of Defense components where the problems of improper delay and deliberate, arbitary and capricious withholding of documents have been multiplied by breaking the processing of FOIA requests into separate processing centerseach with its own backlog and individual incentives to delay, lose or misroute requests. Bringing FOIA processing directly under the control of the main Department of Defense FOIA office, along with civil or criminal sanctions would also do a great deal to rein in those individual malefactors who seem to congregate in OCJS, OASD(ISA), DUSD(PR), and the Office of the General Counsel. There is little doubt that timely and proper release decisions will only be made at the Defense Department after processing is centralized.

5. Classification Abuses

This category could fill a hearing book alone. Some of the more obvious and glaring examples of improper classification, overly broad classifications and clear failures to conduct mandatory declassification review follow.

a. the most egregious example to date has been the Department of Defense's decision to deny under (b)(1) documents which they admit are presently unclassified and will individually remain unclassified on the grounds that a group of these materials when compiled would be classified despite the fact that the legislation that requires Department of Defense reports of arms sales exports requires that the same information (and in some cases the same documents) be provided to Congress in unclassified form except where the national security is clearly jeopardized;
b. This past year, the Department of Defense has begun classifying materials which previously had been available to requesters. Budget justification books, line-item descriptions on program elements, the index of directives, the index of security classification guides and a variety of other records are now not available in any declassified or unclassified form. Previously, the Department of Defense had a policy of attempting to declassify those recurring budget and policy process documents for which they regularly received requests from Congress and the public, such as the Posture Statement, the budget justification books, and so forth.
c. The meeting logs and calendars of the Directors of Central Intelligence and of the Defense Intelligence Agencies which neither agency claimed were personal records under BNA but which they claimed were highly classified including all references to their public testimony, White House social appearances, television interviews and public travel;
d. Recently released materials from USIA, Director Wick took exemption (b)(1) to apply to any subject which involved national security or foreign relations regardless of whether or not it was ever classified before.
e. The Defense Department has claimed that the annual Defense Guidance which has many unclassified sections is classified and that materials can not be segregated from it;
f. DIA has classified foreign public radio broadcasts and foreign newspaper articles widely available throughout the world;
g. Department of Defense and DIA have refused to declassify "unclassified" sections of Security Classification Guidances about unclassified aspects of classified projects.
h. DIA has declassified some intelligence reports while denying certain portions and words within sentences in a manner that suggests selective editing to change the meaning of the material released.
i. We have several identical sets of State department cables which were declassified differently by different reviewers in a manner that would lead one to believe that the less forthcoming of the two reviews occured because it was embarrassing to the agency and not truly classified;

The problem of inappropriate classification has grown to enormous proportions. In a recent conversation, one original classification authority in the State department told me that she regularly classified materials which she believed were "embarrassing to American officials because any embarrassment to them would damage the national security."

We believe that Congress should formalize the requirement that the Executive Branch declassify certain annual documents such as the Defense Guidance and the Budget Justification books on an annual basis within a short time of their use in the government process.

There is an obvious need for extensive training throughout the federal government on the FOIA and particularly on the classification procedures. While we recognize the reluctance of Congress to step into the thicket of executive branch discretion over its internally mandated classification system, some standard of training must be imposed or urged through appropriate oversight.

Even more important, agency classification procedures and internal guidance publications (see discussion below regarding attempts to deny these under the internal personnel procedures exemption number two) must be made readily available for public consumption without waiting for FOIA processing queues. We believe every agency must be required to maintain classification procedures and guidances cited in every instance of classification and to offer them without cost to the public on demand.

In addition, an expeditious procedure is necessary to allow cases of inappropriate classification to be brought under review outside of the agency involved. We believe that the Information Security Oversight Office would be the appropriate institution to assume this responsibility.

During the "mandatory declassification review" of documents which takes place during the processing of an FOIA request for classified materials, we believe it would be highly beneficial to require that all classified documents which are not already portion-marked be so marked during the review and that the portion-marking on derivatively classified documents indicate that each element of information classified under the derived authority is itself specifically classified at no higher a level than the same information in the document on which the classification is based. This would have the beneficial effects of (a) assuring that the entire document is in fact reviewed, (b) that segregable and releasable portions can be more easily determined, (c) that the enormous discretion of agencies to declassify material is more likely to be excercised -- particularly where documents whose classification is derived from other documents which have been declassified or where the classified material is limited to a small number of classifications.

6. Misuse of Fee Waiver Discretion: CATCH 22

The Rose memorandum's more pernicious effects are beginning to surface in a variety of places. Agencies are now routinely inquiring into the editorial intentions of reporters who request records. Recently for example, a Justice department attorney representing the Defense Intelligence Agency said that an 18 page memorandum justifying the entire project under the criteria set forth in the Rose memorandum was inadequate and insisted that the Post specifically indicate how the particular documents in question would be used in articles. We did provide an assurance of relevance but refused to allow the Department of Justice to review the editorial policy of the Post.

Despite extended documentation that materials sought were for an in-depth project and not for daily news coverage, the Department of Defense has repeatedly stated that unless they saw specific references printed "soon," they would deny fee waiver applications. In other instances, the Defense department has challenged the requester's ability to use technical information. We believe these inquiries intrude impermissibly into the heart of the editorial process.

In a recent Customs Office case, an official said that what the Washington Post had written in the past about the efficacy of federal drug interdiction efforts was not in his opinion in the public interest and declined to waive fees or allow documents to be taken until fees had been paid.

In a recent Department of Defense case in which documents were used in the preparation of an Outlook piece in the Post, Department of Defense refused to grant a fee waiver on the basis that the release of the documents was not in the public interest. This was particularly odd since the only search fees occurred as a result of a DoD request that, in order to minimize their internal review time, the Post voluntarily agree to accept only part of the information initially sought in the request. The fees were incurred in the process of segregating the narrower category of material from the whole set of documents.

The abuse of fee waiver discretion has been compounded by the tendency of agencies to reduce the availability of their public affairs offices to individual journalists with whose work the agency differs. These two developments are then used to deter use of the FOIA and reduce the amount of information available to the public. Defense, State and other agencies have cut back journalistic access to their in their opinion, in the interests of the agency. Instead they request that journalists who are "not working on deadline," by which they mean working on a story that goes beyond what they want the press to find out, should use the FOIA. Then when a journalist requests the same information that he would normally get from the public affairs office through the FOIA, the FOIA office demands the payment of fees for what would normally be available as a matter of request.

Ironically, profit-making defense contrators and consulting firms find it easier to get materials without charge than do either public interest groups or journalists.

In addition, most agencies (the departments of Defense and State have instituted some exceptions) do not maintain any meaningful library of materials. Thus materials sought under the FOIA, retrieved and provided one requester are often unavailable without an entirely new search often at tremendous expense to the new requester and always at great expense to the agency. Even more tragic is that twenty years from now the same materials will have to be reviewed again by departmental historians for archival release, again at great expense.

Recently we have witnessed the most abusive pattern of fee imposition to date by both DIA and Department of Defense. In cases where the requester had asked search will involve many thousands of documents at a cost of many hundreds or thousands of dollars. Then the agency notes that since they will only be likely to release small portions of only a few of the documents, they do not deem the request to primarily benefit the public and will therefore not waive fees.

The agency then refuses to process documents until the requester agrees to pay the estimated processing costs of several hundred to several thousand dollars when the case is complete. If the requester does not agree to the higher fee, then the request will not be processed. If the requester does, then he is soon hit with a bill for several hundred dollars which the agency will maintain must be paid immediately not when the fee waiver question is finally resolved on appeal or by judicial determination. This has the effect of allowing an agency to hold several hundred dollars for each request from a requester for the months or years it takes them to process the request, for the months or years of the appeal processing, and for the months or years before the case is resolved. For a requester filing one substantial request each month with the DIA which takes over two years to process the average case and over three years on appeal and which claims $500 for the simplest of searches, this could tie up $30,000 before the first dollar was refunded. This practice is particularly reprehensible when one considers the amount of discretion the agency has over what is ultimately released and the actual cases in which it has been recently applied: materials relating to reasons for the Grenada coup and invasion and materials relating to policy in Central America, both of which are areas in which very substantial amounts of information can be released at the discretion of the agency.

The CIA and DIA have made the question of fees for the reproduction of documents more difficult by always refusing requests to review the releasable documents prior to the requester's specifying that copying is necessary. As a result, searches which turn up nothing more than materials easily obtainable through other means, which a requester would not normally copy, can incur significant copying costs completely beyond the control of the requester. Since

the CIA does not have any minimum threshold of fee charges, virtually all requests, even no record determinations and requests by journalists for records of the most obvious public relevance, are accompanied by charges, apparently imposed for the sole purpose of annoying the requester since $3 charges could not cover the cost of processing the checks.

Several steps toward a solution are apparent. First, legislation should make it clearer that fees should not normally be charged to journalistic and non-profit requesters who can show that they have in the past published or otherwise widely disseminated materials and that they are seeking the material for use in the preparation of a product intended for broad public dissemination. If the pattern of present applications of the Rose Memorandum continues, few journalistic or historic requests for significant categories of records will be made in the future.

Second, we believe that all agencies who maintain a press office should be required to provide under the FOIA without charge to journalistic and non-profit requesters all materials they provide to the press without charge. They should not be allowed to diminish the timely services offered the press by shifting those responsibilities to the FOIA for selected press representatives whose coverage or purposes they find less friendly.

Third, all materials retrieved in cases involving newsworthy incidents, particularly large special cases, and historically relevant material should be retained in a reading room with a publically available index by requester, subject matter of the request and document index number. The evolution of electronic data bases to hold information in most departments is only a few years away and legislation should anticipate the development by requiring that the declassfication of such material shall also be recorded in the data base so that future requests for the same material will include the same declassified items and be handled more expeditiously at less expense.

Fourth, we believe that if Congress does not explicitly exempt journalists and non-profit organizations from fees, it must separate fee waiver appeals from appeals of the substantive portions of an FOIA and require that fee waiver appeals be processed on an expedited basis within eight weeks. In addition, we believe that the statute should require that no fees can be charged in instances where an agency (a) has not provided regular progress reports, (b) has taken more than sixteen weeks to complete processing, or (c) has released additional material on appeal. The third provision is particularly important to avoid some of the more glaring attempts to use fees to intimidate FOIA users.

Fifth, Congress must codify the holding of Eudey v. CIA which stated that "(t)he statute does not permit a consideration of how many documents will ultimately be released...(a) single document may ...substantially enrich the public domain." The statute should also make it clearer that the operative criterion must be the public interest in the material sought even if it ultimately is not released.

Sixth, based on our experience, most agency personnel involved in processing need more training to be able to properly distinguish between search activities and review activities. Alternatively, a total exemption for journalistic and non-profit requesters accompanied by a provision allowing the imposition of fees to commericial requesters for review as well as search might well serve public interests and make the distinction less significant. However, because of the desirability of openness in government and the public interest in declassified materials, we believe that no fees should ever be charged for the mandatory declassication of any records other than those which are sought under the privacy act or in which a privacy interest could be asserted.

We also believe that fee abuses would decline if agencies were required to publish a listing of all mechanical and computerized record keeping systems and data bases, the nature and levels of classification and detail of material contained therein, and the retention and retirement schedule for agency records.

7. Abuse of the (b)(5) Exemption

The rule of thumb in almost every agency with which we deal appears to be that when all else fails they claim a (b)(5) exemption. While the case law on these exemptions seems sufficiently clear to allow only a very narrow category of material to be withheld, agency applications of the exemption have been markedly inconsistent with the statute and the case law. The vast majority of instances in which the exemption is claimed for advice, recommendations or opinions do not involve the type of circumstance in which it is an individual (and thus someone in need of protection) who is giving the advice or in which, if it is an individual, the individual would have a reasonable expectation of his advice remaining confidential. Easily half the (b)(5) examples in which the exemption is claimed for advice, recommendations and opinions involve no specific decision-making process or involve advice which is not actually a part of the specific pre-decisional process apparently being cited. Frequently, the agency makes no effort to identify the specifically exempt portion and to release segregable portions which are not covered by the exemption -- factual data, for example, which the FOIA clearly mandates should be relased even if part of the document isdeliberative. Many other claims under (b)(5) involve situations in which the advice is actually a decision intended to be followed by those receiving the advice.

In short, most government agencies use (b)(5) to protect any document or portion thereof which they wish to keep "private" or "confidential" but which is not classified or otherwise properly exempt. It's application in instances where the materials in question are classified seems to be to prevent the disclosure of those portions of the document which could clearly be segregated and otherwise released.

We believe therefore that more specific legislative guidance on (b)(5) maybe in order. It may be more important however to require agencies to provide sufficient detail to the requester to allow him to determine the appropriateness of the claim. For example, in instances in which (b)(5) claims are made for entire documents or segments of documents, an index similar to a Vaughn index should be required in the initial denial decision for the (b)(5) material including specification of the agency's administrative process and the document's role in that process.

8. The Expanded (b)(2) Exemption

In the past year, we have received dozens of FOIA responses citing the (b)(2) exemption for matters "related solely to the internal rules and practices of the agency" and denying us copies of unclassified security classification guides (used to determine the level at which certain information about each component in highly complicated and often sensitive weapons systems or events can be classified), commonly used intelligence collection forms, and other unclassified materials. The Defense department, DIA and the Justice department have said that (b)(2) is appropriate because these materials are used in strictly internal practices. According to their reading of recent case law (apparently relying heavily on Jordan v. Department of Justice), the intelligence process and the classification process are both intended to keep certain matters secret from the public and anything secret from the public is obviously only an example of one

of those "internal ... practices of an agency," which (b)(2) was meant to exempt from the FOIA.

We have responded that we do not feel (b)(2) is appropriate because: (1) the exemption was never intended to be read so broadly as applying to any internal practice of the agency; (2) under the case law, it is clear that matters in which the public has a direct interest (such as what and how material can be classified or what and how information can be collected by intelligence agencies) are not within the scope of the exemption; (3) the release of the material does not increase the risk of circumvention of a lawful agency regulation; (4) but the denial of the material would amount to the creation of a body of "secret law" and secret procedures which though unclassified would be kept beyond public scrutiny.

For example, we recently received a letter from the Defense Intelligence Agency responding to a September 29, 1983 request (that's only 404 days for an initial denial, practically a record) using (b)(2) to deny us the release of blank copies of six, commonly used, unclassified forms which are listed in the published Listing of Approved Department of Defense (DD) Forms, DOD 5000.21-L as follows:

DOD Form No.	Title
1. 1365	Intelligence Collection Requirments (HITS)
2. 1365C	Intelligence Collection Requirements (HITS) (Continuation Sheet)
3. 1396	DoD Intelligence Information Report
4. 1396-1	Biographic Data Form
5. 1396S	DoD Intelligence Information Report (Supplemental Data_
6. 1495	Field Automated Intelligence File Request

Although DIA did not provide any rationale for their application of this exemption, we note that DoD Freedom of Information Act Program Regulations Subpart D, Section 286.31 (a)(2) applies it to records "containing or constituting rules, regulations, orders, manuals,xdirectives, and instructions relating the internal personnel rules or practices of a DoD Component if their release to the public would substantially hinder the effective perfoamance of a significant function of the Department of Defense and they do not impose requirements directly on the general public."

The use in this case strongly suggests that DoD components are willing to define "substantially hinder" and "impose requirements directly on the general public" is such a broad and capricious manner that virtually any previously unpublished document used in the Department could be encompassed by it. Virtually all unclassified information about weapons systems, mission statements and organizational materials about militlary units, budget documents, and the like could be defined as falling within the scope of the exemption.

We believe that no such broad interpretation was ever intended by Congress. In addition to the fact that these blank, unclassified, commonly-used forms have nothing to do with internal personnel rules or practices, it is noteworthy they are not only used by DIA but by the Army, the Navy, the Air Force, the Defense Mapping Agency, and the Coast Guard. They are the standard operating procedure documents for how the everyday military intelligence needs are met, essential to the most rudimentary inquiry into intelligence collection. No claim is being made that they contain classified information and that their disclosure would endanger or in anyway harm the national security. If that were the case, these blank forms, like many of their completed counterparts, could be classified.

We believe that this emerging government logic had created a sort of "poor man's classification system" of unclassified secret material. Imagine the extention of the argument to improperly classified material. An agency could claim

that although they have to declassify such an item, since it was classified in the first place, it was by definition therefore never intended for public use or dissemination and relates solely to "internal ... practices of an agency."

For these reasons and in light of the other trends dealt with in this letter, we believe that the (b)(2) requires a very careful legislative redefinition. In particular, we believe that new legislation must explicitly assure the applicability of the FOIA to those procedures and practices by which the lines between classified and unclassified materials are drawn, by which the lines between various levels of classification and compartmentalization are drawn, by which those categories are applied to each category of information classified, and by which employee obligations for such things as prepublication review and polygraphing and administrative sanctions are applied.

9. The Practical Effect of Judicial Delay

As the practices we describe above spread throughout agencies, recourse to the federal courts becomes singularly important to resolve these increasingly more regular abuses. As a practical matter however, the vast majority of FOIA requesters lack the time, resources and incentives to go into the federal courts. Almost invariably, it is not until a requester recognizes that there is no other way he can get the information in time for it to be of any use, that he/she finally seeks judicial redress. Once in court, the requester soon finds that the government agencies have a variety of procedural tactics which can delay even the provision of a Vaughn index or other discovery for several months. This procedural delay in effect nullifies the value of judicial recourse. As a result, most requesters -- even those facing the most blatant and improper agency attempts to forestall processing of their requests -- do not avail themselves of litigation.

It is not yet clear what the full effect will be of the recently enacted provisions of 28 U.S.C. Section 1657 (a) as part of the Federal Court's Civil Priorities Act (HR 5645; 98th Congress 2nd Session) which abolish all statutory provisions for expedited and priority treatment of various types of cases and the addition of the "good cause" standard with its specific reference to the FOIA. We believe, however, that new legislation must explicitly define those circumstances in which an agency's failure to process cases in a timely manner or lack of good faith in its representations to the requester are taken into account in the finding of "good cause." In this vein, we believe very strongly that the legislation must state that the court shall conduct such immediate inquiry as is necessary to determine the accuracy of the plaintiffs representations about delay and/or good faith and, if it finds untimely delay or an absense of good faith, shall require the agency to produce simultaneous with its answer to the complaint (ie. 30 days after the filing of the complaint) a Vaughn index. We have suggested other procedural safeguards above which should alleviate certain of the existing problems. The repeated delays and misrepresentations of such agencies as the CIA, the DIA, the departments of State, Defense, Treasury and the Office of Management and Budget speak to the willingness of the government to ignor the law. If the FOIA is to be of use to any group other than the idly curious and the professional historian, federal court review must move FOIA cases expeditiously and not add months on top of years of delay.

While there have been extraordinary individual instances of delays and inappropriate denials, we have concentrated above on the broad themes which appear to exist across agency lines. We look forward to providing any additional detail should you feel appropriate in the coming year. Thank you for this opportunity to describe our experience.

Sincerely,

Scott Armstrong
Staff Writer

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